In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 496

LOUIS FIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 291 F. 2d 113. The opinion of the district court (Pet. App. A) is not reported. The opinion on direct review is reported at 271 F. 2d 883, certiorari denied, 361 U.S. 964.

JURISDICTION

The judgment of the court of appeals was entered May 17, 1961. Petitioner's time to file a petition for writ of certiorari was extended to October 14, 1961, and

the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a conviction is subject to being set aside under 28 U.S.C. 2255 on the ground that the indictment, which charged that petitioner had unlawfully sold narcotics that he knew had been imported into the United States contrary to 21 U.S.C. 174, was fatally defective.

STATEMENT

In the District Court for the Southern District of California, petitioner was convicted of a violation of the Drugs Import and Export Act, 21 U.S.C. 174, for selling more than 17 ounces of heroin. He was sentenced to imprisonment for twenty years and fined $20,000. On appeal to the Ninth Circuit, the conviction was affirmed. 271 F. 2d 883.

Thereafter, in a petition for rehearing, petitioner for the first time challenged the validity of the indictment, on the ground that it failed to specify that petitioner knew the narcotics had been imported "contrary to law." The indictment charged that petitioner "knowingly and unlawfully" sold heroin "which, as the defendant then and there well knew, had been imported into the United States of America contrary to United States Code, Title 21, Section 174." The petition for rehearing was denied, and a petition for a writ of certiorari, raising only the issue of the validity of the indictment, was denied by this Court. 361 U.S. 964.

Thereafter, petitioner again raised the issue of the validity of the indictment by motion in the district

court to vacate sentence under 28 U.S.C. 2255. The district court denied the motion (Pet. App. A) and the court of appeals affirmed (Pet. App. B), 291 F. 2d 113.

ARGUMENT

As we pointed out in our brief in opposition to the petition for a writ of certiorari in which petitioner previously attacked the validity of the indictment (No. 626, O.T. 1959), the indictment was sufficient to withstand attack after verdict even on direct review. The section under which petitioner was charged, 21 U.S.C. 174, makes it a crime fraudulently or knowingly to sell narcotics, "knowing the same to have been imported or brought into the United States contrary to law." The indictment charged that petitioner knowingly and unlawfully sold heroin that he knew had been imported into the United States "contrary to United States Code, Title 21, Section 174." Since Section 174, in addition to covering petitioner's offense, makes fraudulent or knowing *importation* of narcotics contrary to law a federal offense punishable by fine and imprisonment, the reference in the indictment to importation "contrary to United States Code, Title 21, Section 174" is the equivalent of a reference to importation "contrary to law"; indeed, as the lower court pointed out (291 F. 2d at 114), the specification of the "law" allegedly violated by the importation told petitioner more than the statutory phrase "contrary to law" would have told him. Furthermore, an indictment is not required to use the specific wording of the statute. Particularly as against an attack after verdict, an indictment is sufficient if the necessary facts

appear in any form or if by fair construction they can be found within the terms thereof. *Hagner* v. *United States*, 285 U.S. 427, 433.

To the extent that petitioner suggests (Pet. 9) that there is a conflict between the decision below and the decisions of the Seventh Circuit in *United States* v. *Calhoun*, 257 F. 2d 673, and the Tenth Circuit in *Robinson* v. *United States*, 263 F. 2d 911, and *Burley* v. *United States*, 263 F. 2d 912, he is plainly mistaken. Those cases were concerned with the failure of the indictments to allege *knowledge* on the part of the defendants that the narcotics had been imported contrary to law. No such defect is present in the indictment in this case, which alleged that "the defendant then and there well knew" of the illegality of the importation in question.

Since the indictment was sufficient to withstand attack on direct review after verdict, it is clearly invulnerable to collateral attack by motion under 28 U.S.C. 2255. In such a proceeding an indictment is not subject to challenge unless it appears from the face thereof that no offense could possibly have been committed. See *Goto* v. *Lane*, 265 U.S. 393; *Knewel* v. *Egan*, 268 U.S. 442. This indictment clearly charged a federal offense under 21 U.S.C. 174.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1961.

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